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# Negotiable Instruments -- Effect of Counter Signature on Forged Indorsement -- Implied Validation

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the weight of authority,<sup>13</sup> is the better view. Conceding that this permits discrimination, it seems that the opposite rule would be even more unjust, in that it would discriminate against residents of a municipality who are, in reality, bearing the greater burden of paying for the service. Since a municipality cannot tax non-residents, it should at least be able to demand higher utility rates, and it certainly should not be saddled with the burden of showing that the rates established are not unreasonable. That burden should be left with the party alleging it.<sup>14</sup>

### NEGOTIABLE INSTRUMENTS — EFFECT OF COUNTER SIGNATURE ON FORGED INDORSEMENT — IMPLIED VALIDATION

Appellant, check-cashing service, sent appellee's check, drawn by its president, but not counter-signed,<sup>1</sup> through for collection. Drawee bank secured the signature of appellee's comptroller, and paid appellant's bank. Appellant, upon notice of the deposit, paid value for the check. Upon discovery that check bore a forged indorsement, appellee instituted action to determine the respective rights to the fund. *Held*, for appellant. Where a co-signer signs a check bearing a forged indorsement, the co-signer impliedly guarantees the validity of the endorsement, and "engages that on due presentment the instrument will be accepted or paid, or both. . . ."<sup>2</sup> *Block v. Howard Sober Inc.*, 60 So.2d 538 (Fla. 1952).

Generally, a forged indorsement passes no title,<sup>3</sup> even if the subsequent transferee is a bona fide holder without notice.<sup>4</sup> The drawer of a check can recover monies paid on a forged indorsement from the drawee<sup>5</sup> or any subsequent holder of the check.<sup>6</sup> The drawee bank, unable to charge the

13. *Supra* note 4.

14. *Durant v. City of Beverly Hills*, 102 P.2d 759 (Cal. 1940); *Cooper v. Tampa Electric Co.*, 154 Fla. 410, 17 So.2d 785 (1944); *Louisville & Jefferson County Metropolitan Sewer Dist. v. J. E. Seagram & Sons, Inc.*, 307 Ky. 413, 211 S.W.2d 122 (1948).

1. 5A MICHIE, BANKS AND BANKING § 171 (1950) (bank cannot pay a check requiring a counter-signature if one is lacking. The check is invalid).

2. NEGOTIABLE INSTRUMENTS LAW § 61; FLA. STAT. § 674.63 (1951).

3. *Ocala Nat. Farm Loan Ass'n v. Munro & Chambliss Nat. Bank*, 89 Fla. 242, 103 So. 609 (1925); *Hayes v. Midland Credit Co.*, 173 Minn. 554, 218 N.W. 106 (1928).

4. *Warren v. Smith*, 35 Utah 455, 100 Pac. 1069 (1909). *But cf. United States v. Guaranty Trust Co. of New York*, 293 U.S. 340 (1934).

5. *Farmers' State Bank in Merkel v. United States*, 62 F.2d 178 (5th Cir. 1932); *Seidman v. North Camden Trust Co.*, 122 N.J.L. 580, 7 A.2d 406 (Sup. Ct. 1939); *Talbot v. Bank of Rochester*, 1 Hill 295 (N.Y. 1841); *Labor Bank & Trust Co. v. Adam*, 23 S.W.2d 814 (Tex. Civ. App. 1930). See BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENT LAW 445 (7th ed. 1948).

6. *Borserine v. Maryland Casualty Co.*, 112 F.2d 409 (8th Cir. 1940); *Talbot v. Bank of Rochester*, 1 Hill 295 (N.Y. 1841); *Life Ins. Co. of Virginia v. Edisto Nat. Bank of Orangeburg*, 166 S.C. 505, 165 S.E. 178 (1932); *United States Fidelity & Guaranty Co. v. First Nat. Bank of El Paso*, 93 S.W.2d 562 (Tex. Civ. App. 1936).

drawer's account,<sup>7</sup> can recover from persons who received payment.<sup>8</sup> Money paid on a forged indorsement cannot be recovered where it would be inequitable, especially where the plaintiff is negligent in making the payment.<sup>9</sup> This doctrine is derived from the rule that a holder of a forged instrument cannot enforce payment "unless the party, against whom it is sought to enforce such right is *precluded* from setting up the forgery."<sup>10</sup>

*Precluded* is synonymous with estoppel.<sup>11</sup> Although some courts have construed "preclude" to include the ratification of forgeries,<sup>12</sup> this doctrine has been generally repudiated.<sup>13</sup> The defendant is estopped from asserting the defense of forgery where his own negligence made the forgery possible,<sup>14</sup> or in circumstances tantamount to an order to pay,<sup>15</sup> or where defendant knew of the forgery and delayed in notice to prevent subsequent forgeries.<sup>16</sup>

In the instant case, the court reasoned that since "life is fused into

7. *United States v. Nat. Bank of Commerce of Seattle*, 205 Fed. 433 (9th Cir. 1913); *Ellis Weaving Mills v. Citizens & Southern Nat. Bank of Spartanburg*, 91 F. Supp. 943 (W.D. S.C.), *aff'd*, 184 F.2d 43 (4th Cir. 1950). 5B MICHIE, BANKS AND BANKING § 277a (1950). See note 5 *supra*. The bank is liable to the depositor for money paid on checks bearing forged indorsements, unless the drawer is estopped from recovery.

8. *Borserine v. Maryland Casualty Co.*, 112 F.2d 409 (8th Cir. 1940); *United States v. Nat. Rockland Bank*, 35 F. Supp. 812 (D. Mass. 1940); *United States Nat. Bank of Portland v. Union Bank of Philadelphia*, 268 Pa. 147, 110 Atl. 792 (1920); *People's Bank v. Franklin*, 88 Tenn. 299, 12 S.W. 716 (1889); *Vagliano v. Bank of England*, 23 Q.B. Div. 243 [1889].

9. *United States v. National Rockland Bank*, 35 F. Supp. 912 (D. Mass. 1940); *Hardy v. Chesapeake Bank*, 51 Md. 562 (1879); *Murphy v. Metropolitan Nat. Bank*, 191 Mass. 159, 77 N.E. 693 (1932).

10. NEGOTIABLE INSTRUMENTS LAW § 23; FLA. STAT. § 674.25 (1951) (emphasis supplied).

11. *Baskett v. Ohio Valley Banking & Trust Co.*, 214 Ky. 41, 281 S.W. 1022 (1926); *Shoemakersville First Nat. Bank v. Albright*, 111 Pa. Super. 392, 170 Atl. 370 (1934). See BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENT LAW 455-456 (7th ed. 1948).

12. *Coral Gables, Inc. v. Granara*, 285 Mass. 565, 189 N.E. 604 (1934); *Strader v. Haley*, 216 Minn. 315, 12 N.W.2d 608 (1944); *Denison Cholson Dry Goods Co. v. Hill*, 135 Tenn. 60, 185 S.W. 723 (1916). See BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENT LAW 455-456 (7th ed. 1948).

13. *Anderson v. Mechanics Loan & Saving Co.*, 58 Ga. App. 147, 198 S.E. 87 (1938); *Union Trust Co. v. Soble*, 64 A.2d 744 (Md. 1949); *Bank of Commerce of Louisville v. McCarty*, 119 Neb. 795, 231 N.W. 34 (1930); *Johnson v. First Nat. Bank of Beaver Falls*, 367 Pa. 459, 81 A.2d 95 (1951); *Shoemakersville First Nat. Bank v. Albright*, 111 Pa. Super. 392, 170 Atl. 370 (1934); *Morris Plan Bank v. Continental Nat. Bank of Fort Worth*, 155 S.W.2d 407 (Tex. Civ. App. 1941); *Merchants' Bank v. People's Bank*, 99 W.Va. 544, 130 S.E. 142 (1925). See BEUTEL'S BRANNAN, NEGOTIABLE INSTRUMENT LAW 455-456 (7th ed. 1948).

14. *Basch v. Bank of America Nat. Trust & Savings Ass'n*, 22 Cal.2d 316, 139 P.2d 1 (1943); *American Sash & Door Co. v. Commerce Trust Co.*, 332 Mo. 98, 56 S.W.2d 1034 (1932); *Land Title Bank v. Cheltenham Nat. Bank*, 362 Pa. 30, 66 A.2d 768 (1949).

15. *Basch v. Bank of America Nat. Trust & Savings Ass'n*, 22 Cal.2d 316, 139 P.2d 1 (1943); *Smith v. Mechanics & Traders Bank*, 6 La. Ann. 610 (1857); *Dodge v. Nat. Exchange Bank*, 20 Ohio St. 234 (1870); *Litchfield Shuttle Co. v. Cumberland Valley Nat. Bank*, 134 Tenn. 379, 183 S.W. 1006 (1916).

16. *United States v. Washington Loan & Trust Co.*, 47 F. Supp. 25 (D. D.C. 1942); *National Surety Co. v. Bank of the Manhattan Co.*, 133 Misc. 48, 231 N.Y. Supp. 389 (Sup. Ct. 1928); *Market St. Title & Trust Co. v. Cheltenham Trust Co.*, 296 Pa. 230, 145 Atl. 848 (1929).

the check by the one who finally signs,"<sup>17</sup> the comptroller's signature validated the check, and by allowing it to be paid, the drawer guaranteed its genuineness.<sup>18</sup> Thus the drawer admits "the existence of the payee and his then capacity to indorse,"<sup>19</sup> and that the execution of the check with the payee's indorsement thereon, was an implied acknowledgement of the genuineness of the indorsement.

It is submitted that the court might also have found that appellee, drawer, was estopped from recovery on the check because the comptroller's signature was equivalent to an order to pay without reference to the genuineness of the indorsements.<sup>20</sup> However, the court did note appellee's irregular business methods and equitably refused recovery by placing the financial burden upon the person who had the last opportunity to avoid the loss.

### REAL PROPERTY — TITLES — SURVIVAL OF EASEMENT UNDER TAX SALE

Defendant acquired the tax-sale title to an alleyway which had been subject to easements by appurtenant property owners, and attempted to halt the use of the easements. *Held*, the tax sale of a servient estate does not extinguish an appurtenant dominant easement. *Engel v. Catucci*, 197 F.2d 597 (D.C. Cir. 1952).

Generally, by statute, a tax deed of delinquent property is in the nature of a new and independent grant from the sovereign and vests a new and absolute title in fee in the purchaser.<sup>1</sup> However, a large majority of the jurisdictions which so provide, hold that an appurtenant easement survives a tax sale of the property.<sup>2</sup> Some states make specific statutory provision that appurtenant easements will survive.<sup>3</sup> This is based on the theory that the easement is not taxed with the servient estate, but is carved out of the property and is separate from it. The easement is taxed with the dominant

17. *Goodyear Tire & R. Co. v. Wells Fargo & U.T. Co.*, 1 Cal. App.2d 694, 37 P.2d 483, 489 (1934); *Globe Indemnity Co. v. First Nat. Bank in St. Louis*, 133 S.W.2d 1066, 1072 (Mo. 1939).

18. *Horstman v. Henshaw*, 11 How. 177 (1850); *Cogill v. The American Exchange Bank*, 1 N.Y. (Comstock) 113 (1847); *Meacher v. Fort*, 3 Hill (S.C.) 227 (1837). The drawer of a bill affirms the genuineness of the forged indorsement by passing the bill into circulation. *But cf. Roberts v. Tucker*, 13 Q.B. 560, 117 Eng. Reprints 994 (1851). See 2 MORSE, BANKS AND BANKING § 477 (5th ed. 1917).

19. NEGOTIABLE INSTRUMENTS LAW § 61; FLA. STAT. § 674.63 (1951).

20. See note 15 *supra*.

1. *Rist v. Toole County*, 117 Mont. 426, 159 P.2d 340 (1945); *Polenz v. City of Ravenna*, 145 Neb. 845, 18 N.W.2d 510 (1945); *Warren v. Blackman*, 62 S.D. 26, 250 N.W. 681 (1933). *Contra: Cornett v. Swift Coal and Timber Co.*, 112 F.2d 387 (6th Cir.), *cert. denied*, 311 U.S. 659 (1940); *Gunter v. Townsend*, 202 Ala. 160, 79 So. 644 (1918); *City of Beckley v. Hatcher*, 67 S.E.2d 20 (W.Va. 1951).

2. *Ross v. Franko*, 139 Ohio St. 395, 40 N.E.2d 664 (1942). Also Kan., N.H., N.J., N.M., Ohio, Okla., Ore., Pa., Utah and Wisc.

3. MASS. GEN. LAWS, c. 60, § 45 (1932); N.Y. TAX LAW § 154, IOWA CODE § 448.3 (1949) (restrictive covenants will survive).